A

AFM Shafiqul Hafiz v Public Prosecutor

B HIGH COURT (KUALA LUMPUR) — NOTICE OF MOTION NO WA-44–99–06 OF 2018
MOHD NAZLAN J
15 OCTOBER 2018

C *Criminal Procedure — Revision — Application for — Objective of revision — Powers and discretion of High Court — Sessions court ordered for joint trial — Elements that must be established by prosecution for application for joint trial — Whether mere finding of same transaction was sufficient — Suitability of ordering a joint trial — Whether joint trial would be fair and just — Whether accused would be prejudiced by joint trial — Capital Markets and Services Act 2007 s 188(2)(a) & (3)(a) — Criminal Procedure Code ss 165 & 170*

D

This was a criminal revision application against the sessions court order for a joint trial filed by the applicant who was charged with an offence under s 183(3)(a) of the Capital Markets and Services Act 2007 ('the CMSA'). The order of joint trial was in respect of another case where one Harjit Singh a/l Gurdev Singh ('HS') was charged under s 188(2)(a) of the CMSA. The applicant's contention were as follows: (a) the order for joint trial would prejudice the applicant as HS would be a material witness for the prosecution, but an accused was not competent to give evidence for the prosecution, as such the applicant would be denied his right to cross-examine HS, a material witness for the prosecution's case because a co-accused (HS) was non-compellable as a witness in a joint trial like that ordered against the applicant and HS; (b) HS would be a material witness for the defence's case, as HS would be the only real position in affording a defence to the applicant under s 198(2)(b) of the CMSA. Section 173(j)(iii) of the Criminal Procedure Code ('the CPC') precluded the applicant from exercising his right to call HS as his material witness; and (c) a joint trial would result in an inordinate delay of the trial. The respondent contended the following: (i) the revisionary powers ought only to be invoked in deserving cases and that there was no error in the exercise of the discretion of the sessions court in ordering a joint trial; and (ii) there was a clear nexus between both the accused persons, and the information in the charges against the applicant and HS was identical in nature.

E

F

G

H

I

Held, allowing the application:

(1) The primary objective of the availability of the revision powers was essentially to put right a miscarriage of justice. In any revision application, the overriding question to be determined was whether

substantial justice had been done or would be done and whether any order made by the lower court should be interfered with in the interest of justice (see paras 12–13).

(2) The power of the High Court sitting in revision was discretionary. The power must be used sparingly having regard to all the circumstances of the each particular with the overriding view to correcting or preventing a miscarriage of justice. It must be exercised judicially and within the limits of and in the spirit of the legislation (see para 18).

(3) The elements to be established by the prosecution applying for a joint trial to the satisfaction of the court whether there was indeed a same transaction or whether a series of acts were so connected as to form one transaction which included principally proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design (see para 28).

(4) The power to order a separate or joint trial was a power exercisable by the trial court, the granting or refusing of which application was entirely a matter of discretion of the trial judge (see para 29).

(5) A mere finding that there was one same transaction should not without more result in the making of an order for a joint trial. The discretion vested in the trial judge warranted that it be exercised judicially. This necessitated further consideration, on the facts of the case, to the extent available at that early stage, on matters of potential prejudice and the interest of justice. The overriding consideration in the exercise of discretion to consider the suitability of ordering a joint trial under s 170 of the CPC was whether a joint trial would be fair and just, and whether the accused would be prejudiced by a joint trial (see paras 33 & 35).

(6) The ability to cross-examine a material witness, one who was on the basis of the charge inexorably linked to the allegation against the applicant, was an essential right which had now became non-existent in view of the joint trial. This tantamount to a failure to accord an accused a fair trial at the stage of the prosecution. It prejudiced the applicant and amounted to a miscarriage of justice (see para 48).

(7) The key was that the judicial discretion in considering a joint trial application must be carefully exercised to consider the charges against the accused persons, availability of defences, and how they were involved in the offences and the relationship of the charges between one and the others (see para 49).

(8) Given the statutory defence under s 198 of the CMSA, and the position of HS as potentially the only witness who could give evidence on matters specified in the charge against the applicant, including in particular for the applicant to establish that he could not have reasonably known that

HS would tend to acquire the impugned shares in reliance of the alleged communication of inside information to HS by the applicant, it was patently clear that the ability of the applicant to call HS as a witness was of crucial importance to his defence (see paras 65–66).

[Bahasa Malaysia summary

Ini merupakan permohonan semakan jenayah terhadap perintah mahkamah sesyen untuk perbincangan bersama yang difailkan oleh pemohon yang dituduh dibawah satu kesalahan dibawah s 183(3)(a) Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP'). Perintah perbicaraan bersama adalah berkaitan dengan satu lagi kes yang mana penama Harjit Singh a/l Gurdev Singh ('HS') telah dituduh dibawah s 188(2)(a) APMP. Hujahan pemohon adalah seperti berikut: (a) perintah untuk perbicaraan bersama akan memprejudiskan pemohon kerana HS merupakan saksi material pendakwaan, akan tetapi seorang tertuduh tidak layak untuk memberikan untuk pendakwaan, oleh yang demikian, pemohon akan dinafikan hak untuk memeriksa balas HS, saksi material untuk kes pendakwaan kerana seorang yang dituduh bersama tidak boleh dipanggil sebagai seorang saksi dalam perbicaraan bersama sepertimana diperintahkan terhadap pemohon dan HS; (b) HS akan menjadi seorang saksi yang material kepada kes pembelaan, kerana HS adalah satu-satunya orang yang berada dalam kedudukan untuk memberi pembelaan kepada pemohon dibawah s 198(2)(b) APMP. Seksyen 173(j)(iii) Kanun Tatacara Jenayah ('KTJ') mengecualikan pemohon daripada menggunakan haknya untuk memanggil HS sebagai saksi material; dan (c) satu perbicaraan bersama akan mengakibatkan penangguhan yang melampau kepada perbicaraan. Responden pula menghujahkan seperti berikut: (i) kuasa semakan hanya patut digunakan dalam kes yang layak dan tiada kekhilafan dalam penggunaan budi bicara mahkamah sesyen dalam memerintahkan perbicaraan bersama; dan (ii) wujud nexus yang jelas antara kedua-dua tertuduh dan maklumat dalam pertuduhan antara pemohon dan HS adalah serupa.

Diputuskan, membenarkan permohonan:

(1) Matlamat utama kewujudan kuasa semakan adalah untuk memperbetulkan satu kesilapan mahkamah. Dalam apa-apa permohonan semakan, persoalan utama yang perlu ditentukan adalah sama ada keadilan substantif telah dilakukan atau akan dilakukan dan sama ada apa-apa perintah yang dibuat oleh mahkamah rendah harus dicampur tangan dalam kepentingan keadilan (lihat perenggan 12–13).

(2) Kuasa mahkamah tinggi yang bersidang untuk semakan adalah berdasarkan budi bicara. Kuasa tersebut mesti jarang digunakan mengambil kira semua keadaan setiap kes dengan maklumat untuk membetulkan atau menghalang kesilapan mahkamah. Ianya harus digunakan secara adil dan tertakluk kepada had dan dengan matlamat undang-undang tersebut (lihat perenggan 18).

(3) Elemen yang perlu dibuktikan oleh pendakwaan dalam memohon perbicaraan bersama kepada kepuasan mahkamah adalah sama ada sememangnya wujud transaksi yang sama atau sama ada satu siri perlakuan adalah berhubung untuk membentuk satu transaksi yang secara prinsipnya termasuklah kerapatan masa, kesatuan atau kerapatan tempat, kesinambungan tindakan dan kesinambungan matlamat atau reka bentuk (lihat perenggan 28).

(4) Kuasa untuk memerintahkan perbicaraan bersama atau berasingan adalah kuasa mahkamah bicara, dengan pemberian atau penolakan permohonan sedemikian adalah budi bicara hakim bicara (lihat perenggan 29).

(5) Dapatan bahawa wujud transaksi yang sama tidak seharusnya mengakibatkan perintah untuk perbicaraan bersama. Budi bicara yang diletakkan kepada hakim bicara perlu dijalankan secara adil. Ini memerlukan pertimbangan lanjut, berdasarkan fakta kes, setakat mana yang wujud di peringkat awal sedemikian, berdasarkan hal kebarangkalian prejudis dan kepentingan keadilan. Pertimbangan utama dalam menjalankan budi bicara tersebut adalah untuk menimbangkan kesesuaian untuk memerintahkan perbicaraan bersama di bawah s 170 KTJ adalah sama ada satu perbicaraan bersama adalah adil dan saksama dan sama ada tertuduh akan terprejudis oleh satu perbicaraan bersama (lihat perenggan 33 & 35).

(6) Kebolehan untuk memeriksa balas saksi material, yang merupakan asas pertuduhan yang berkaitan kepada tuduhan terhadap pemohon, adalah hak asas yang mana sekarang tidak wujud sekiranya dibicarakan bersama. Ini adalah terjumlah kepada kegagalan untuk memberikan kepada tertuduh satu perbicaraan yang adil di peringkat kes pendakwaan. Ianya memprejudiskan pemohon dan terjumlah kepada satu kesilapan mahkamah (lihat perenggan 48).

(7) Kunci adalah budi bicara mahkamah dalam mempertimbangkan permohonan perbicaraan bersama haruslah dijalankan secara berhati-hati untuk menimbangkan pertuduhan terhadap tertuduh, kewujudan pembelaan, dan bagai mana mereka terlibat dalam kesalahan dan hubungan antara satu pertuduhan dengan yang lain (lihat perenggan 49).

(8) Mengambil kira pembelaan statutori dibawah s 198 APMP, dan kedudukan HS sebagai satu-satunya saksi yang boleh memberikan keterangan atas perkara yang dinyatakan dalam pertuduhan terhadap pemohon, termasuk untuk pemohon membuktikan bahawa dia tidak mengetahui bahawa HS akan mendapatkan saham yang dicabar bergantung kepada komunikasi yang kononnya merupakan maklumat dalaman kepada HS oleh pemohon, adalah jelas bahawa kebolehan

pemohon untuk memanggil HS sebagai seorang saksi adalah penting kepada pembelaannya (lihat perenggan 65–66).]

Notes

For cases on application for revision, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 3860–3988.

Cases referred to

Aik Ming (N) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
Amrita Lal Hazra And Ors v Emperor [1915] 42 Cal 957, HC (refd)
Datuk Haji Wasli bin Mohd Said v PP and another application [2006] 5 MLJ 172, HC (refd)
Emperor v Nasrullah And Ors AIR 1928 All 287, HC (refd)
Gurdit Singh v PP [1983] 1 MLJ 264 (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88 (refd)
Ku Izham bin Ku Adnan v PP [1998] 5 MLJ 720, HC (refd)
Lee Teck Wah and another v PP [1998] 1 SLR(R) 726, CA (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69, SC (refd)
Lim Sing Hiaw v PP [1965] 1 MLJ 85, FC (refd)
Loh Shak Mow v PP Wong Hoi Ping; Alan v PP [1987] 1 MLJ 362 (refd)
Manokaran & Anor v PP [1979] 1 MLJ 262 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Kulasingam [1974] 2 MLJ 26 (refd)
PP v Loh Ang Sing [1965] 2 MLJ 129 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
R v Grondkowski; R v Malinowski [1946] 1 All ER 559; [1946] 1 KB 369 (refd)
R v Moghal (1977) 65 Cr App Rep 56, CA (refd)
Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101; [2007] 1 CLJ 565, FC (refd)
Teja Singh & Mohamed Nasir v PP [1950] 1 MLJ 71 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)
Tse Po Chung Nathan & Anor v PP [1993] 1 SLR 961 (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 188, 188(2)(a), (2)(b), (3), (3)(a), 198, 198(2), (2)(b)
Courts of Judicature Act 1964 ss 31, 35, 36, 37
Criminal Procedure Code ss 51A, 165, 165(1), 170, 170(1), 173(ha), (ha)(iii), (j)(iii), 323, 323(1), 424(1), (1)(a), Chapter XXXI
Evidence Act 1950 s 114(g)

Kamarul Hisham Kamaruddin (Tiara Katrina Fuad with him) (Kamarul Hisham & Hasnal Rezua) for the applicant.
Shoba Veno Gobal (Nordiana Mohamad with her) (Deputy Public Prosecutor,

Attorney General's Chambers) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This is a criminal revision application filed by the applicant, who had been charged with an offence of insider dealing under the securities law, against the decision of the sessions court ordering his joint trial with another accused.

[2] At the conclusion of the hearing, I allowed the application, directed that the two accused persons to be separately tried, and highlighted my principal reasons for the same. This judgment contains the full reasons for the decision.

KEY BACKGROUND FACTS

[3] The applicant was on 22 February 2018 charged at the sessions court with an insider dealing offence under s 183(3)(a) of the Capital Markets and Services Act 2007 ('the CMSA'). He claimed trial to the charge which reads as follows:

> Bahawa kamu, antara 22 Mac 2009 dan 6 April 2009, di Malaysia, sebagai orang dalam, telah menyampaikan seseorang bernama Harjit Singh a/l Gurdev Singh (No Kad Pengenalan: xxxx25-01-xxxx) ('Harjit Singh') maklumat yang tidak boleh didapati secara umum, yang, apabila boleh didapati secara umum, seseorang yang munasabah akan menjangkakan maklumat itu mempunyai kesan material ke atas harga atau nilai saham Johor Land Berhad (No Syarikat: 12379-K) ('JLand') dan kamu semunasabahnya, patut mengetahui bahawa maklumat itu tidak boleh didapati secara umum, iaitu maklumat mengenai cadangan penswastaan JLand melalui satu tawaran am voluntary ('VGO') pada harga RM1.55 sesaham, dan kamu semunasabahnya patut mengetahui bahawa Harjit Singh akan berkecenderung untuk memperoleh saham JLand yang perdagangannya dibenarkan di pasaran saham Bursa Malaysia Securities Berhad dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 188(3)(a) Akta Pasaran Modal dan Perkhidmatan (Akta 671) dan boleh dihukum di bawah seksyen 188(4) Akta yang sama.

[4] The offence under s 188(3)(a) of the CMSA, as reflected in the charge against the applicant is essentially one of communicating material inside information on the relevant securities to another person who in turn would deal in the securities. The offence under s 188(2)(a) and (b) in contrast, is one which concerns the act of acquiring or disposing the securities.

[5] Not unexpectedly therefore, on the same day the applicant was charged, albeit not at the same time, one Harjit Singh a/l Gurdev Singh ('HS') claimed trial to three charges for offences under s 188(2)(a) of the CMSA.

[6] A few months later, on 15 May 2018, the respondent, as the prosecution filed an application for the charge preferred against the applicant and the three charges against HS to be jointly tried under s 170 of the Criminal Procedure Code ('the CPC') read together with s 165.

[7] On 6 June 2018, the sessions court allowed the application and ordered that the charges against the applicant and HS be jointly tried, principally on the ground, for present purposes, that the charges against the two accused were so connected together so as to form part of the same transaction.

[8] The applicant, who had opposed the application for the joint trial then filed a notice of application on 22 June 2018 to the High Court for a revision against the joint trial order of the sessions court. Hence the instant proceeding before me.

BASIS OF APPLICATION — REVISIONARY POWERS OF THE HIGH COURT

Revision powers

[9] The powers of revision are encapsulated in Chapter XXXI of the CPC and especially in ss 31, 35, 36 and 37 of the Courts of Judicature Act 1964 ('the CJA'). Section 323(1) of the CPC provides as follows:

> A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

[10] In the case of *Manokaran & Anor v Public Prosecutor* [1979] 1 MLJ 262 it was stated by Abdoolcader J (as he then was) that the High Court has not only extensive powers of revision in criminal proceedings under the provisions of s 323 of the CPC, 'but even wider powers conferred by section 35 of the Courts of Judicature Act 1964 ...'.

[11] Section 35 of the CJA reads:

> 35 General supervisory and revisionary jurisdiction of High Court
>
> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for

the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

[12] The primary objective of the availability of the revision powers — which is essentially to put right a miscarriage of justice — has been aptly described by the former Supreme Court in *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69 which cited with approval the leading Indian case on this subject — *Emperor v Nasrullah And Ors* AIR 1928 All 287 (Ind), in the following terms:

> Object of revision
>
> We would observe that the power of revision is to be exercised in accordance with the law for the time being in force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is —
>
> > ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.
> >
> > (*Emperor v Nasrullah & Others* AIR 1928 All 287).
>
> It is also clear that the High Court may examine the record of proceedings in the subordinate courts 'wherever it considers that in doing so the purpose of justice will be served, as for example, accused is subjected to a vexatious and groundless prosecution'. (*Ramanathan Chettiyar v Subrahmanya Ayyar* ILR 47 Mad 722).
>
> Duty of High Court
>
> Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.
>
> The Judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the Judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

(See also the decision of the Federal Court in *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565).

[13] As such, in any revision application, the overriding question to be determined is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice (see also *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26).

Revision of orders for joint trial

[14] Revision powers had been invoked in the past vis a vis a challenge against an order for a joint trial, just like presently. In the High Court decision of *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88, a case referred to by the counsel for the applicant herein, the accused therein filed a revision application to set aside the order for a joint trial. Harun J (as he then was) ruled as follows:

> In the event, the learned president ordered the trial to proceed on the first three charges and stayed the hearing of the fourth charge. At the request of the defence yesterday, the learned president adjourned further hearing to Monday February 26, 1979 to enable this court to give the necessary directions under section 35 of the Courts of Judicature Act 1964.
>
> At the outset, it must be said that the prosecution's concern is the legality of the trial. Such concern is understandable in view of the Privy Council's decision *Subramania Ayyar v King-Emperor* and followed by *Chin Choy v Public Prosecutor* which held that where charges are tried together in contravention of any of the provisions of the Criminal Procedure Code there is an illegality which cannot be cured and that any convictions had cannot be sustained.

[15] In *Gurdit Singh v Public Prosecutor* [1983] 1 MLJ 264, Mohamed Dzaiddin J (later Chief Justice) held that to the extent that the High Court has before it a record of criminal proceeding, the condition precedent to its exercise of revisionary power is met. In this regard I would agree that the direction to the parties that affidavits be filed in relation to this application can be deemed to constitute the act of 'calling for the record of proceedings' within the meaning of s 35 of the CJA as well as s 323 of the CPC, in view of the fact that the evidence contained therein would sufficiently apprise this court of the proceedings in the court below.

[16] No less importantly, affidavit evidence may be used in revision proceedings, given the provisions of s 424(1)(a) of the CPC which states:

> Subject to any rules of the Court, any affidavit may be used in a criminal court if it is sworn:
>
> (a) In the Federation before any Magistrate or Registrar
>
> (b) ...

[17] In *Ku Izham bin Ku Adnan v Public Prosecutor* [1998] 5 MLJ 720 it was held that since s 424(1) of the CPC authorised the use of affidavit in a criminal proceeding, the same is thus permitted in a revision because when a court hears a revision application and acts within its revisionary powers, it does so as a Criminal Court within the contemplation of s 424(1).

[18] Above all, authorities are clear in stating that the power of the High Court sitting in revision is discretionary. The power must be used sparingly having regard to all the circumstances of the each particular with the overriding view to correcting or preventing a miscarriage of justice. It must be exercised judicially and within the limits of and in the spirit of the legislation (see the above-mentioned decision of the Supreme court in *Liaw Kwai Wah v Public Prosecutor*).

ESSENCE OF THE CONTENTIONS OF THE LITIGANTS

[19] In support of his contention that the order for joint trial by sessions court under s 170 of the CPC read together with s 165 is erroneous, the applicant in the main argued that a joint trial in the circumstances of this case will cause or may likely cause prejudice to the applicant, firstly at the stage of the case of the prosecution where HS would ordinarily be a material witness for the prosecution in its case against the applicant.

[20] However, it is rudimentary that an accused is not competent to give evidence for the prosecution, and a co-accused is also not compellable to give evidence for or against an accused in a criminal proceedings. This therefore means that the applicant would be denied his right to cross-examine HS, a material witnesses for the prosecution's case because a co-accused (HS) is non-compellable as a witness in a joint trial like that ordered against the applicant and HS.

[21] Secondly, considering the charge preferred against the applicant, at the stage of the defence, the applicant contended that HS would be a material witness for the defence's case. This is because HS would be the only person who is in any real position of affording a defence to the applicant under the specific provisions of s 198(2)(b) of the CMSA. Yet s 173(j)(iii) of the CPC precludes the applicant from exercising his right to call HS a his material witness in the event HS decides to exercise his right, as a co-accused, to not give evidence in his defence.

[22] In addition the applicant also maintained that a joint trial would result in an inordinate delay in the trial of the applicant given that the prosecution will have to prove, and HS will likely raise in his defence, matters which are entirely irrelevant to the applicant's case.

[23] The respondent on the other hand, in resisting this revision application, asserted that the revisionary powers ought only to be invoked in deserving cases and that there was no error in the exercise of the discretion of the sessions court in ordering a joint trial. A setting aside of the order of the sessions court, according the respondent would result in a floodgate that would interfere with the administration of justice.

[24] It was also argued that the cases relied on by the applicant ought really to be distinguished, for in the instant case there is a clear nexus between both the accused persons, and the information in the charges against the applicant and HS is identical in nature.

EVALUATION AND FINDINGS OF THIS COURT

The test for joint trials

[25] The starting point ought to be the relevant provisions on joint trials as contained in the CPC. The order was granted as is usual in cases more than one accused is jointly tried under s 170 read together with s 165 of the CPC. The former reads as follows:

> 170 When persons may be charged jointly
>
> (1) When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all the charges.

[26] Section 165(1) of the CPC provides the following:

> 165 Trial for more than one offence
>
> (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.
>
> (2) ...

[27] It should be stated that the crux of s 170(1) is that the offences involving the different accused persons are committed in the same transaction. The burden lies on the respondent (the prosecution) on making its application that a joint trial ought to be granted on the facts of this case (see *Public Prosecutor v Loh Ang Sing* [1965] 2 MLJ 129).

[28] The elements to be established by the prosecution applying for a joint trial to the satisfaction of the court whether there is indeed a same transaction or whether a series of acts are so connected as to form one transaction, as articulated in *Amrita Lal Hazra And Ors v Emperor* [1915] 42 Cal 957, and as later applied in local jurisdiction in cases such as *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88 include principally proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

[29] Although the court considering such application will examine these elements constituting same transaction under s 170, it is an important proposition of law governing s 170 that the power to order a separate or joint trial is a power exercisable by the trial court (see *Jayaraman & Ors v Public Prosecutor*), the granting or refusing of which application is entirely a matter of discretion of the trial judge.

[30] Thus, where such discretion has been judicially exercised by the court, there is no basis for appellate intervention unless it appears that a miscarriage of justice has resulted either from granting or refusing the application, as so clearly established in the leading authority on this subject in the English case of *R v Grondkowski; R v Malinowski* [1946] 1 All ER 559; [1946] 1 KB 369.

[31] In that case, it was unsuccessfully submitted on appeal that where the key part of one accused person's defence amounts to an attack upon another accused, a separate trial should be ordered. The Court of Criminal Appeal reasoned its rejection of that argument in the following terms:

> The law is, and always has been, that this is a matter of discretion for the judge at the trial. The court so stated the law in this very case, and quite recently in *Youth v R* [1945] WN 27 the Judicial Committee said that the question of joint or several trials had always been left to the discretion of the presiding judge. The discretion, no doubt, must be exercised judicially, that is, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. If once it were taken as settled that every time it appears that one prisoners as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. (Per Lord Goddard CJ at p 732).

[32] The former Federal Court in *Lim Sing Hiaw v Public Prosecutor* [1965] 1 MLJ 85 made the same observation on the true application of the guiding principle of judicial discretion where Thompson LP held instructively as follows:

> We do not dissent from the opinion of the former Court of Appeal though, of course, it has less force where a case is to be tried by a judge alone than where it is to be tried by a judge and assessors as was the case under the 1948 Regulations. Nevertheless the question of joint or separate trial of charges, within the limits of the

Criminal Procedure Code, a matter within the discretion of the trial judge and is to be decided in the light of the particular circumstances of each individual case.

The court must exercise its discretion judiciously

[33] As such a mere finding that there was one same transaction should not without more result in the making of an order for a joint trial. The discretion vested in the trial judge warrants that it be exercised judicially. This necessitates further consideration, on the facts of the case, to the extent available at that early stage, on matters of potential prejudice and the interest of justice. And it is of course not lost on me that the very language of s 170 refers to the operative word 'may' in the first place.

[34] The High Court in *Datuk Haji Wasli bin Mohd Said v Public Prosecutor and another application* [2006] 5 MLJ 172 further described the position clearly in the following terms:

> [39] The 'same transaction' yardstick can only be tested against the charges now facing KG and WMS. I am satisfied that those offences occurred at the same time (date) and place. (Fairlane Hotel in Kuala Lumpur). However, I am not convinced that the prosecution has shown as they are now duty-bound to prove that the other criteria of unity of purpose or design and continuity of action of both the accused persons are present in the charges. KG faces two charges. Firstly, that he took part in the decision making to approve the sale of 16.8 million shares of LKTNS in SAPI for his own benefit. Secondly, he cheated the board of LKTNS by concealing PBB's offer and influenced the board to approve the sale of those shares to Briskmark. WMS faces two charges of bribing John Liaw and Michael Emban. On the face of these charges alone, I am doubtful if there is a nexus between them or that there was a unity of purpose or design in their acts. This court should lean in favour of this doubt andallow the accused persons the benefit of that doubt. Here I am reminded by the advice of Desai J in his judgment in *Mukerji*'s case. His Lordship said this:
>
> > I must deprecate courts' taking unnecessary risk in holding joint trials in doubtful cases. I consider it nothing short of foolishness to hold a joint trial, unless its legality is beyond dispute, and take the risk of the trial being held to be invalid by higher court. If the higher court does not order retrial, there may arise serious miscarriage of justice from the holding of the joint trial. If it orders retrial, though justice may be done ultimately, it would be done after a waste of public time and money and unnecessary expenditure and inconvenience to the parties. There can be no excuse for all this. 'The law is that a joint trial may be held and not that it must be held. A court is never obliged to hold a joint trial'. Even where it can hold it, it is open to it to hold separate trials for the various offences. A prudent judge would, therefore, always hold separate trials whenever he has the slightest doubt about the validity of a joint trial.
>
> [40] There is another principle brought to this court's attention by Dato' Shafee Abdullah, of counsel for KG which this court should seriously consider in deciding

whether or not to exercise its discretion to order a joinder. It is this. An improper joinder of trials and charges will result in an illegality which cannot be cured. The advice of Lord Wright in *Babulal*'s case was adverted to this court by learned counsel. His Lordship said this:

> It has been taken as settled law on all sides throughout these proceedings that the infringement of s 239(d) would, if made out, constitute an illegality, as distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in *Subramania Ayyar v King-Emperor* as contrasted with the result of an irregularity, as to which *Abdul Rahman v Emperor*'s case is an authority.

[41] And in *Chin Choy v Public Prosecutor* [1955] 21 MLJ 237, Mathew CJ in echoing that principle said that (at p 238):

> In our view, there can be no doubt that the trial together of these four charges was an illegality and the trial was therefore bad. When charges are wrongly joined, the prosecutor should be asked to elect before the pleas are taken which charge or charges he wishes to proceed on, and thus avoid a trial which is illegal and bad. As a practice, charges which are not capable of being tried together should be made on separate charge sheets and the subject of separate trials.

[42] Lastly, I need also mention that if WMS and KG were jointly tried, the prosecution needs to establish the guilt of each of the accused as a separate exercise. In exercising this discretion, I need to remind myself that both the accused persons may be subjected to a long trial complicated by the admission of evidence which may be relevant to one but not to the other. If that happened, then the court may be prejudiced by evidence that would be irrelevant if they were separately tried. The evidence against WMS and KG in the case of a joint trial would certainly be jumbled together, there may be a danger that the evidence would not be separately considered on the basis of its admissibility against each accused person, as happened in *Loh Shak Mow v Public Prosecutor* [1987] 1 MLJ 362.

[43] All considered, I feel that it would be in the interest of justice that I disallow this application for a joinder.

[35] It may thus be stated that the overriding consideration in the exercise of discretion to consider the suitability of ordering a joint trial under s 170 of the CPC is whether a joint trial will be fair and just, and whether the accused will be prejudiced by a joint trial. Case-law authorities such as *R v Grondkowski; R v Malinowski* [1946] 1 All ER 559; [1946] 1 KB 369 and *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71 have established that both the interests of justice and the interests of the accused must be taken into account.

[36] The criticality of considering the justice of the case was also emphasised (as referred to by the counsel for the applicant in his submission) by Thompson LP in *Lim Sing Hiaw v Public Prosecutor* where His Lordship held thus:

A In the present case we can see nothing in the way of injustice or possible miscarriage of justice that could possibly be attributed to the trial of the two charges together and would justify us in interfering with the way in which Azmi J exercising his discretion in refraining to order separate trials.

B **[37]** The English Court of Criminal Appeal in *R v Grondkowski; R v Malinowski* [1946] 1 All ER 559; [1946] 1 KB 369 also specified that the justice of the case in an application for joint trial requires consideration of any prejudice that may be occasioned to an accused person.

C **[38]** The position is clearer when reference be made to the charge preferred against the applicant, which was in respect of the offence allegedly committed under s 188(3)(a) of the CMSA which parts relevant for present purposes read as follows:

D 188 Prohibited conduct of person in possession of inside information

...

(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not,
E directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to:

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in
F subsection (1) relates.

...

The applicant is now denied the right to cross-examine the most material witness of
G *the respondent*

[39] When the charge against the applicant is considered, it will be readily appreciated that the applicant is accused of having communicated the inside information to HS. HS is crystal clearly the person in receipt of the
H information said to have been communicated by the applicant. The prosecution will have to prove that the applicant communicated the said information to HS during the material time, all of which as have been specified in the charge. In addition the prosecution will also have to prove that the applicant ought reasonably to have known that HS would tend to deal in the
I securities concerned, and that HS did acquire the same in reliance of the inside information said to have been communicated to HS by the applicant.

[40] As mentioned, HS claims trial to three charges under s 188(2)(a) of the CMSA. The focus on the charges is the purchase of the relevant shares on the

basis of the inside information. Although the applicant's name is not mentioned in any of the three charges, it is not disputed that this inside information is the exact same one alleged to have been communicated by the applicant to HS. The three charges are different from one another only in respect of the dates and the incidents of purchase. It is clear that the dates specified in the three charges correspond to the time period stated in the single charge against the applicant.

[41] Without a doubt, based on the charge against the applicant, and in light of the ingredients of the offence under s 188(3) of the CMSA, HS would be a key person to help establish the case for the prosecution. His testimony would be absolutely crucial to the prosecution. And as highlighted by the applicant, the documents supplied to the applicant by the prosecution in adherence to s 51A of the CPC, being documents the prosecution seek to tender at the trial, did not, so the applicant asserted, include any documentary evidence on which the prosecution seeks to rely to prove the matters related to the communication of the inside information — the fact of communication from the applicant to HS, knowledge of HS's tendency to deal in securities, and HS's reliance on the information in acquiring the shares. This makes reliance on the testimony of the HS as a witness to be all the more crucial.

[42] It cannot be emphasised enough that HS would be a material witness for the prosecution. And it is trite that the prosecution is obliged to call witnesses material to proving its case or to establishing the unfolding of the narrative of its case. In the often cited Supreme Court case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 Edgar Joseph Jr FCJ held thus:

> On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not (see *Teh Lee Tong v PP* [1956] MLJ 194.) That discretion, however, must be exercised having regard to the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v Oliva* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 at p 49, applied in *R v Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).
>
> ...
>
> In *Richardson*, the High Court of Australia (at pp 119–120), gave general guidance to the prosecution as to how it was to approach its task as to the choice of witnesses to be called at the trial and mentioned as examples of factors to be taken into account for this purpose 'whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown'. The court then went on to say:

> What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors, and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused.
>
> ...
>
> Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg *Adel Muhammed el Dabbah v A-G of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144), *the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation — which is nothing less than a statutory duty — the accused must be acquitted*. (Emphasis added.)

[43] To further underscore the importance of this rule, the law also permits a presumption under s 114(g) of the Evidence Act 1950 in the form of an adverse inference to be drawn against the party who fails to produce an important and material witness to its case (see further the leading Supreme Court decision in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492).

[44] Concomitant with this duty of the prosecution to call material witnesses to unfold the narrative of its case, is the equally important right of an accused to cross-examine the material witnesses of the prosecution. Indeed, in this regard, the principle expressed in the leading decision of the Court of Appeal in *Aik Ming (N) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 is also of relevance, where it was held as imperative that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination, and that a failure in this respect could be construed as an abandonment of the pleaded case.

[45] But herein lies the crux of the problem. For HS, as an accused in this case, cannot be called as a witness to prove the prosecution's case against himself or any other accused person with whom he is tried. In the context of a joint trial involving two accused persons like presently, even if one is a material witness for the prosecution against the other, the prosecution cannot compel the first mentioned accused person to give evidence as a prosecution witness.

[46] If the trial for the applicant and HS is not jointly held, the inability of the prosecution to call HS in his own trial to prove the former's case against HS is of little concern to the applicant who would be facing his own charge in a different trial. More crucially for him, in the situation of him being a sole accused who is tried separately from HS, the prosecution will have to call HS, and the applicant will therefore be able to exercise his right to cross-examine a material witness of the prosecution.

[47] But it is worthy of emphasis that in a joint trial situation, as HS cannot be called at the stage of the prosecution, neither, as a consequence, can the applicant exercise his right to examine a material witness for the prosecution, with a view to casting a reasonable doubt on the case of the prosecution. But for the joint trial, the applicant would otherwise be able to cross-examine HS in the applicant's own trial.

[48] This cannot now happen given the order for the joint trial. This ability to cross-examine a material witness, one who is on the basis of the charge inexorably linked to the allegation against the applicant, is an essential right that is has now become non-existent in view of the joint trial. This in my view tantamount to a failure to accord an accused a fair trial at the stage of the prosecution. It prejudices the applicant and amounts to a miscarriage of justice.

[49] I must highlight that this finding does not mean that in all cases where there are two or more accused persons, a joint trial would necessarily translate into a miscarriage of justice as one accused cannot cross-examine the other accused during the prosecution stage. Not at all. The key is that the judicial discretion in considering a joint trial application must be carefully exercised to consider the charges against the accused persons, availability of defences, and how they are involved in the offences and the relationship of the charges between one and the others.

[50] After all, the trial judge must consider the case on the basis of the evidence admissible against each accused separately (see *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71). In the Singapore High Court decision in *Loh Shak Mow v Public Prosecutor Wong Hoi Ping; Alan v Public Prosecutor* [1987] 1 MLJ 362, the appeal was successful for the reason, among others that the trial judge did not consider the appropriateness of ordering a joint trial on the basis of the evidence admissible against each accused respectively. It was held thus:

> The trial judge gave no reasons for ordering a joint trial either when the application for a joint trial was made or in his grounds of decision. It was for the trial judge to decide whether the two accused should be tried together or separately. The discretion must be exercised judicially.
>
> The usual tests applied to decide whether different acts are parts of the same transaction (to bring it within s 175 of the Criminal Procedure code) are proximity of time, unity of place, unity of purpose or design and continuity of action (*Public Prosecutor v Loh Ang Sing* [1965] 2 MLJ 129).
>
> There were three groups of charges: (1) four CBT charges against the appellant; (2) fourteen CBT charges against Loh Shak Mow; (3) twenty-eight charges of abetment of cheating against Loh Shak Mow. The prosecution proceeded on six ofthe twenty-eight abetment of cheating charges against Loh Shak Mow. The rest were stood down.

A The date of deceiving alleged in the first of the twenty-eight abetment of cheating charges against Loh Shak Mow was January 5, 1982, and the date of the twenty-sixth charge was August 17, 1982. The dates of deceiving in twenty-six of twenty-eight charges against Loh Shak Mow were before the date of the alleged criminal breach of trust (August 25, 1982) by the appellant in the first charge against him. In fact all the six charges of abetment of cheating which the prosecution elected to proceed against Loh Shak Mow were before the first CBT charge against the appellant. It is not disputed that Loh Shak Mow and Lee Kwong Fai shared the profits 50/50 until August 25, 1982, and that the appellant did not know this and that the appellant did not receive any share of the profits before August 25, 1982. There is no proximity of time and no unity of purpose and continuity of action.

Conspiracy to cheat or actual cheating was not material to the question whether the appellant committed criminal breach of trust. The CBT charges against the appellant were not dependent on there having been cheating at BVC nor on the source of the funds at all. Had BVC's funds been acquired perfectly legitimately the directors who dishonestly misappropriated any part of it could have been charged with criminal breach of trust.

The trial judge did not consider the case on the basis of the evidence admissible against each accused separately. He considered the case as if he was trying charges of conspiracy in which the acts and statements of all the alleged conspirators pursuant to the conspiracy were admissible against both the accused.

The result of the joint trial was that the appellant was subjected to an unnecessarily long and complicated trial lasting some eight weeks when evidence was adduced of cheating or attempted cheating or conspiracy to cheat which was not probative of the offences with which the appellant was charged and on which he was unfairly and improperly cross-examined by the DPP as to the offences with which he was not charged, with the result that the trial judge did not consider the case on the basis of the evidence admissible against each accused separately. He treated the appellant as a conspirator in a conspiracy with which he was not charged and in which he was not named.

The consequence was that the appellant was confronted by grossly prejudicial material which influenced the trial judge, adversely to the appellant, when he came to consider the disputed evidence relating to the charges against the appellant. With the result that the trial judge failed to consider adequately or properly the essential question whether it was proved by the prosecution that the appellant in receiving the monies from BVC on each occasion charged did so with the dishonest intention to cause wrongful loss to BVC.

A joint trial should not have been ordered as it was not fair and just to the appellant and the joinder has occasioned a failure of justice. I am impelled to the conclusion that the appellant's convictions must be quashed. I allow the appeal and quash the convictions and sentences.

[51] In the instant case, on a review of the charge against the applicant and

s 188 of the CMSA, it is fairly plain that the evidence against the applicant would to a considerable extent be dependent on the testimony of HS. The applicant is after all charged for communicating the inside information to HS. The latter has within his knowledge the truthfulness or otherwise of the fact of that alleged communication, whether they were done within the period specified in the charge, whether HS is one who would tend to deal in securities and whether he did so in this case in reliance of the inside information said to be communicated by the applicant.

[52] Short of adducing documents to show the alleged communication, which would usually be very rarely available in insider trading cases, which could also be the situation in the instant case given the applicant's submission on the s 51A documents that did not appear to include such information, and other than reliance on circumstantial evidence, the testimony of HS would therefore assume great importance.

[53] I am further reminded of the astute observation of Scarman LJ (as he then was) in *R v Moghal* (1977) 65 Cr App Rep 56 at p 62 as follows:

> ... we think that only in very exceptional cases is it wise to order separate trials *when two or more are jointly charged with participation in one criminal offence.* The present case is an object lesson of the risks. The risks were analysed by Lord Goddard, Lord Chief Justice, in *Grondkowski v Malinowski* (1946) 31 Cr App R 116; [1946] KB 369. In the course of delivering the judgment of the Court in that case he said, p 371: 'prima facie it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be. Suppose, for instance, that the defence of one was that he or she was acting under the positive duress of the other. It would be obviously right that they should be tried by the same jury, who might see in one prisoner a harmless or nervous looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime'. The question is for the judge in the exercise of his discretion, and it is thus that the law has been stated ever since, that the appellate Court will intervene only if satisfied that the judge's decision has caused a miscarriage of justice. (Emphasis added.)

[54] This instant case cannot be characterised as what may be said to be a typical situation where two accused each are blaming the other. It cannot be because the offences alleged to have been committed by the applicant are different. One, the applicant is facing an insider dealing charge in the nature of a tipping offence whilst HS, the other of a dealing offence.

[55] As such under the circumstances of the instant case before me, a joint

A trial of the applicant and HS would in my view occasion a failure of justice to the applicant.

Potentiality of the applicant being unable to call a material witness

B **[56]** In addition, the unfairness does not end there. For even at the stage of the defence, assuming a prima facie case has been found against both accused, another facet of prejudice could potentially be encountered by the applicant. It is this.

C **[57]** A joint trial in this case may result in the applicant not being able to call a material witness in his defence. The English Court of Criminal Appeal in *Grondkowski* for example referred to the case of *R v Bradlaugh*, where separate trial was ruled should have been ordered. In that latter case, an accused resisted a joint trial with a few others since the latter had already been convicted for a D similar offence and that the former had intended to call them as witnesses for his own defence.

[58] The principle that a joint trial may cause prejudice where a co-accused E intends to call another co-accused as a witness was also implicitly accepted by the Singaporean Court of Criminal Appeal in *Tse Po Chung Nathan & Anor v Public Prosecutor* [1993] 1 SLR 961 where the first accused elected to remain silent but the second accused decided to give evidence in her defence.

F **[59]** This conundrum is not difficult to appreciate. If after defence has been called against all accused, any one of the accused persons in a joint trial can legally be prevented from calling the other accused, like in the instant case involving the applicant and HS, because HS, a co-accused to the applicant in a joint trial, is not a compellable witness. He cannot, as an accused, under the G law be compelled to give evidence on account of the fact that he is also an accused.

[60] And nor can HS, as a co-accused be compelled to give evidence as a witness by another co-accused like the applicant herein. Firstly it is a H well-entrenched rule of criminal procedure as contained in s 173(ha)(iii) of the CPC that an accused (HS or the applicant) who is called to enter his defence shall have the right to remain silent. This is inviolable and cannot be taken away from an accused.

I **[61]** Secondly, under s 173(j)(iii) of the CPC, if the accused elects to give evidence, he shall be allowed to recall and cross-examine any witness and he may also be cross-examined on behalf of any other accused person.

[62] In other words, if HS chooses to testify, he may be cross-examined by the applicant. If HS elects to remain silent, quite apart from the rule against compelling an accused to give evidence, the applicant will again, this time at the defence stage, not have the right to cross-examine HS, let alone call HS as his witness. Again this would potentially be a scenario only because of the order for a joint trial of HS and the applicant as co-accused. The respondent's reliance on *Lee Teck Wah and another v Public Prosecutor* [1998] 1 SLR(R) 726 does not assist its case for, as stated in its own written submissions in reply, that Singapore Court of Appeal decision held that each co-accused was competent to give evidence on behalf of himself or his co-accused, but not compellable to do so. This is exactly what the applicant is arguing about. *Lee Teck Wah* however, according to the respondent, also stated that there is no authority for separate trial just because an accused is deprived of the testimony of a co-accused who elects to remain silent.

[63] However, a more directly pertinent ruling in *Lee Teck Wah* is this. It is clear that LP Thean JA, who delivered the judgment of the court, stated that the co-accused (A) in that case elected not to give evidence in respect of his own defence. Such an election did not however amount to an election not to give evidence for one's co-accused (B). The latter (B) was in that case not deprived of the former's (A) evidence. The court stated that even though not compellable, (A) seemed quite prepared vis a vis his statement from the dock, to give evidence for (B), but (A) was not called. Thus, the point is quite manifest. An accused is not compellable to give evidence for a co-accused. In other words, HS cannot be compelled to give evidence for the applicant. In a joint trial, it is entirely up to HS whether he wishes to give evidence for the applicant, as a co-accused.

[64] I must also mention the passage in *Archbold* (2009 Ed, Sweet & Maxwell) at p 116, which as highlighted by the counsel for the applicant stated the following:

> However, where a co-defendant was entitled to cross-examine the appellant on the contents of an interview which had been ruled inadmissible for prosecution purposes, and where counsel for the co-defendant made it clear that she intended so to cross-examine, the prejudice was such as to justify a departure from the general practice of trying co-conspirators together and, in those circumstances, the judge should have granted separate trials. *R v O' Boyle* 92 Cr App R 202, CA.

[65] In the instant case before me, clearly the applicant intends to call HS as his witness as averred in the former's affidavit which stated as such, including affirming that the latter's evidence could avail the applicant to his defence against the charge. In particular it was stated that HS would be the only witness

who could testify on matters set out in s 198(2)(b) of the CMSA which would provide the applicant a complete defence against the charge. It is imperative that the provision of s 198 be stated. It reads:

> 198 Parity of information defence
>
> (1) A person does not contravene subsection 188(2) if —
>
> (a) the securities that are the subject of the transaction or agreement or the action of procuring a transaction or an agreement are not securities which are permitted on the stock market of a stock exchange;
>
> (b) the court is satisfied that the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement; and
>
> (c) that person acquires or disposes of such securities on such terms and in such circumstances that —
>
> (i) he does not obtain any gain or avoid any loss, including an unrealised gain or unrealised avoidance of loss in price or value, of the securities, as the case may be, for himself or any other person by reason of the effect that the information is likely to have when it becomes generally available; and
>
> (ii) the purpose of the acquisition or disposal of the securities does not include any purpose of securing a gain or avoiding a loss, as the case may be, for himself or any other person by reason of the effect that the information is likely to have when it becomes generally available.
>
> *(2) In a prosecution for an offence under subsection 188(3) where the person communicated information or caused information to be communicated to another person, it shall be a defence —*
>
> (a) *if the court is satisfied that the information came into the possession of the person so communicating the information solely as a result of it being made known in a manner likely to make it generally available pursuant to section 184; or*
>
> (b) *if the court is satisfied that the other party knew of, or ought reasonably to have known, the information before the information was communicated.* (Emphasis added.)

[66] Given this statutory defence, and the position of HS as potentially the only witness who could give evidence on matters specified in the charge against the applicant, including in particular for the applicant to establish that he could not have reasonably known that HS would tend to acquire the impugned shares in reliance of the alleged communication of inside information to HS by the applicant, it is patently clear that the ability of the applicant to call HS as a witness is of crucial importance to his defence.

[67] That however will never happen in the event HS chooses to remain silent under s 173(ha) of the CPC — not in his own trial — but in a joint trial scenario as presently ordered by the sessions court.

[68] In such an event, it would seem inevitable if not an absolute certainty that the applicant would have no recourse whatsoever so compel HS to testify. Nor could the applicant resort to any other avenue to enable him to invoke his defence under s 198(2) of the CMSA.

[69] It cannot legitimately be said that the potential presence of such constraints on the applicant as a result of the order for a joint trial poses no prejudice to the applicant in the conduct of his defence. I would think this situation too would be a form of a miscarriage of justice contemplated by the case law authorities mentioned earlier that would justify revisionary interference of this High Court.

[70] It is manifest and the respondent did not show the contrary, in that the Sessions Court did not appear to have examined these considerations of possible prejudice to the accused should a joint trial be ordered other than performing the examination of whether the conduct of parties constituted the same transaction under s 170.

[71] No sufficient consideration, if at all, was given to the question whether a joint trial would be in the interest of the accused and in the interest of a fair trial. This shortcoming amounts to a failure to properly exercise the judicial discretion in the context of s 170 of the CPC (see the Supreme Court decision in *Liaw Kwai Wah v Public Prosecutor* referred to earlier).

Prosecution in an advantageous position — Cross-examining HS against the applicant instead of examining HS in chief if it were not a joint trial

[72] Yet another potentially prejudicial scenario could easily manifest itself where in a joint trial, despite the two accused being non-compellable witnesses to the respondent (and to each other), the respondent is able to cross-examine HS at the defence stage (should HS elect to give evidence) and in the process adduce evidence against the applicant, something that ought otherwise to be done vis a vis HS by way of examination-in-chief, if not for the joint trial. Again this situation occurs only in a joint trial situation and where the offence subject to the charges are different.

[73] This situation is described aptly in *Archbold* at p 116 in the following terms:

> Although there is no firm rule, it will often be appropriate to order separate trials where an indictment contains a count that A assaulted B, together with a count that C assaulted A. If a joint trial were to take place in such a case and either defendant gave evidence in his own defence, counsel for the Crown could cross-examine him to bring out evidence against the other defendant, rather than adduce such evidence by examination-in-chief. This situation would be prejudicial to a defendant againstwhom such evidence was adduced and is to be distinguished from the situation that arises where defendants are jointly charged with the same offence and run cut-throat defences, which enables counsel for the Crown to vross-examine each about the other. In the latter situation, the prejudice would arise from the nature of the respective defences. In the first situation, the avoidance of unusual prejudice will normally outweigh the convenience of not having to call the same witnesses at two separate trials: *R v Johnson (A)* [1995] 2 Cr App R 1, CA.

[74] The offences in this joint trial are different, as I have emphasised earlier. The applicant and HS were not charged with the same offence. As such, the issue of each running a cut throat defence, by giving evidence on one's own behalf and strengthening the case of the respondent would not arise. But it is clear, in so far as the applicant is concerned, that evidence against him would be attempted by the respondent to be elicited from HS by the wide ranging method of cross-examination, instead of examination in chief which would not be possible in a joint trial. This puts the respondent at a more advantageous position, potentially to the detriment of the interest of the applicant.

[75] In a separate trial situation where the sole accused is the applicant, HS being a material witness to the prosecution will have to be called as a prosecution witness. The evidence against the applicant will have to be brought out of HS via examination in chief. But the applicant can then cross-examine HS. In clear contrast, in a joint trial situation, both are non-compellable witnesses. If HS elects to be his own witness at the defence stage assuming it is called against both, whilst the applicant can cross-examine HS, significantly, so can the respondent who will be able to take advantage of that opportunity to cross-examine HS to adduce evidence against HS as well as the applicant.

Consideration on long and complicated trial

[76] I cannot but agree with the applicant that the other consideration that ought to have been taken into account in the exercise of discretion to determine the desirability of a joint trial is whether it would subject an accused person to a long and complicated trial as evidence not relevant to his case would be produced. Thus in *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 the High Court observed as follows:

> The other danger of a joint trial is that if no evidence is adduced against the second accused, and subsequently the second accused is acquitted, it may have worked to

the prejudice of the second accused as he may have been subjected to a long and complicated trial which to a large extent may not have been relevant to him. In the Singapore case of *Loh Shak Mow v Public Prosecutor*, the High Court, on the facts of that case held that the joint trial in that case had 'occasioned in failure of justice' (at p 382).

[77] It is not immediately clear whether this aspect on evidence not relevant to the applicant was raised let alone considered in the application for a joint trial at the sessions court.

CONCLUSIONS

[78] Despite the riposte by the respondent that the concerns expressed by the applicant are premature and speculative and that the prosecution has wide latitude to conduct its case, I find that the order for joint trial has as a matter of fact already resulted in the right of the applicant to cross-examine HS as the respondent's most material witness to be wholly illusory. As is, potentially, the applicant's right to call HS as a defence witness, in the event the latter elects to remain silent, adversely denying the ability of the applicant to cast doubt on the prosecution case and to establish the statutory defence. Conversely, in such a situation where HS decides to give evidence in his defence, the respondent is relieved of its duty of proving its case through the examination-in-chief of its witnesses by instead being able to adduce evidence against the applicant by the cross-examination of a co-assused, HS, in the event HS elects to give evidence.

[79] I would readily say that these consequences, arising from the order for a joint trial, given the facts of this case, reflect a patent omission to ensure a proper exercise of judicial discretion in considering joint trial application, which without a doubt, is prejudicial to and constitute a miscarriage of justice against the applicant, rendering revisionary interference by this High Court nothing but inevitable and wholly warranted. To state the obvious, the prejudice resulting from a joint trial of the applicant and HS is overwhelmingly disproportionate to the purported convenience of a joint trial. I must emphasise that as stated earlier, authorities such as *Datuk Haji Wasli* and *Jayaraman* already ruled that a case that is wrongly jointly tried is a nullity that is incurable. Any conviction resulting therefrom must be set aside. It is therefore imperative that any irregularity be put right at this early stage.

[80] In view of the foregoing reasons, I allow the notice of motion filed by the applicant (specifically prayers 1 and 2 therein) to have the charge preferred against him to be separately tried from the three charges against HS and for the order for joint trial against both as previously granted by the sessions court to be set aside.

Application allowed.

Reported by Izzat Fauzan